IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EL DORADO TERMINAL COMPANY (a corporation), *Appellant,* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), GENERAL AMERICAN TRANSPORTATION CORPORATION (a corporation), *Appellees.*	No. 11,538
EL DORADO TERMINAL COMPANY (a corporation), *Appellant,* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), *Appellee.*	No. 11,539

APPELLANT'S REPLY BRIEF.

W. F. WILLIAMSON,
WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco 4, California,
Attorneys for Appellant.

WILLIAM B. MEAD,
310 Sansome Street, San Francisco 4, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

Cases

Statutes

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EL DORADO TERMINAL COMPANY (a corporation), *Appellant,* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), GENERAL AMERICAN TRANSPORTATION CORPORATION (a corporation), *Appellees.*	No. 11,538
EL DORADO TERMINAL COMPANY (a corporation), *Appellant,* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), *Appellee.*	No. 11,539

APPELLANT'S REPLY BRIEF.

The Brief for Appellees is divided into sections, entitled as follows: "Foreword", "Chronology", "Statement of the Case", and "Argument". However designated, all of these parts, including the "Chronology", are made up of argument. We have vainly

tried to rearrange the points of argument advanced by Appellees and correlate them with the questions involved in these appeals, namely: (A) Was there an issue tendered by Appellees' answer to the complaints in the District Court?; (B) Was such issue triable in the District Court?; (C) Was the issue so tried?; and (D) Did the decisions or the mandates of the Supreme Court direct or authorize the District Court to summarily dismiss the actions and deny Appellant a trial of the issue?

At pages 3-7, inclusive, in its Opening Brief Appellant made a statement of the case and the questions involved. In their brief Appellees accept the statement, with what they term certain minor exceptions, to which we shall briefly refer in the interest of exactitude before submitting our argument. Appellees' first exception to Appellant's statement is a charge that Appellant's Opening Brief failed "to disclose the significance of the two reports and orders of the Interstate Commerce Commission bearing directly upon this controversy" and "that Appellant does not even mention the first report of the Commission though it was the immediate cause of this litigation". In the same category is the claim advanced by Appellees, that Appellant's reference to what is called "the Commission's later report and order" merely stated "that on April 10, 1944 the Commission released a decision and order, without stating the nature of the decision or the substance of the order". These challenges to the sufficiency of the Appellant's statement point the error which seems to have pursued counsel

for Appellees throughout their treatment of the cases. The District Court based the orders and the judgments under attack in the present appeals entirely upon the decisions of the United States Supreme Court and the mandates following those decisions. Therefore, no good purpose could have been served by an elaborate review of the decisions of the Interstate Commerce Commission. In the first place, an issue of fact pending in an assumpsit action in the District Court could not have been tried by the Interstate Commerce Commission to the exclusion of the District Court. Secondly, the Supreme Court of the United States held (408 U. S. 322) that the District Court had complete jurisdiction of the action and of the parties, and that jurisdiction necessarily continued until a judgment was rendered after trial. One of the present actions, No. 11,538, was never called for trial in the District Court or elsewhere, and no action whatever was taken between the filing of the answer and the pre-trial conference. In the other action there was a trial. The judgment of the District Court was reversed by this Court (104 Fed. (2d) 903) which set the judgment at large and which was followed by a decision of the Supreme Court in *General American Tank Car Corporation v. El Dorado Terminal Company,* 308 U. S. 422. The decision of the Supreme Court reversed this Court and remanded the case to the District Court for further proceedings, that is, a trial, following an appropriate proceeding by the Interstate Commerce Commission.

The report of the Commission in the proceeding entitled "Use of Privately Owned Refrigerator Cars" (201 I.C.C. 325) to which Appellees refer as, "the first order" was a report dealing only with abuses attendant upon the use of refrigerator cars. The decision and the order of the Commission expressly excepted tank cars from the effect of that order. The decision also expressly recognized that a shipper lessee was entitled, under the Elkins Act and the Commerce Act, to collect from the carriers, in the form of mileage compensation, not only the amount paid as car rentals, but "any additional actual expense of the shipper in connection with the cars". These features appear in the portion of the Supreme Court's decision quoted at page 6 of the Brief for Appellees and have significance on this appeal. If, as stated, the Commission expressly excepted the use of tank cars from the operation of its decision and order, in the refrigerator car case, that decision is not pertinent to the present cases which deal only with the use of tank cars and not refrigerator cars. Again, the holding by the Interstate Commerce Commission that a shipper lessee was entitled to collect from the carriers not only its car rentals but its other actual expenses in connection with the cars, is directly opposed to the contentions of the Appellees on their appeal. That holding constitutes a perfect answer to Appellees' next contention that it discontinued the mileage payments to Appellant, provided for in the car lease agreement, in excess of the car rentals, because of the decision in the refrigerator car case. In that decision, as above

stated, the Commission expressly held that a shipper lessee was entitled to claim not only the car rentals but its actual expenses in connection with the cars. The amount and the necessity of those expenses are matters that could have been developed on the trial of the present cases under the issue tendered by defendant's answers. It is a fair inference from the course that Appellees have pursued that they have only desired to retain the unjust enrichment received by them in violation of the provisions of Section 15 (13) of the Interstate Commerce Act and in breach of their agency created by the car lease agreement. We do not labor this point because it is wholly irrelevant to the present appeals. The merit of the special defense pleaded by Appellees in this action did not, and could not, turn upon Appellees' motives in breaching the car lease agreement.

In further criticism of Appellant's statement of the case Appellees assert that the second cited order of the Commission passed upon the validity of the payments claimed by Appellant in the present actions and that Appellant's statement incorrectly referred to the Commission's proceedings as a "limited investigation". The first of these claims clearly evidences the mistaken theory of Appellees that the Interstate Commerce Commission could decide an issue pending in the United States District Court which had, according to the pronouncement of the Supreme Court, complete jurisdiction of the subject-matter of the action and of the parties. Moreover, the investigation of the Commission could not and did not pass upon the validity,

in the light of the final results obtained, of *payments that had not yet been made.* (328 U. S. 17, 19, 20.) The Commission, as appears in the portion of the report quoted on pages 18 and 19 of Appellees' Brief, only dealt with payments made by the Tank Car Corporation under the car leasing agreement prior to the institution of these actions. Referring to such past payments, the Commission held that the car rental "was the only cost incurred * * * in furnishing the tank cars" and that "a just and reasonable allowance as maximum *to have been paid by the respondent rail carrier or carriers* to the Oil Works for the furnishing of such cars *would have been an amount not to exceed* such rental", and that "such an amount and allowance *has been paid to the Oil Works* through credits made by the Tank Car Corporation". (Italics supplied by us.)

Answering the argument of Appellant that the validity of previous payments was not involved in the Commission's investigation and that the question committed to the Commission by the decision of the Supreme Court in *General American Tank Car Corporation v. El Dorado Oil Works,* supra, was whether the Commission should cancel the order that payments would not be made to the shipper lessee, and direct that the carriers should in the future provide for uniform payment of the earned mileage to the shipper lessee and publish that change. This would have conformed to the decision of the Supreme Court that under the plain provisions of Section 15 (13), the shipper lessee, having furnished the cars, was entitled

to the earned mileage and that the carriers could not make payments to others. The Supreme Court on the second case held that the question committed to the Interstate Commerce Commission involved the validity of those previous payments and that the Commission had properly so decided. (328 U. S. 17, 19, 20.)

Appellees' claim that the statement of the case set out in Appellant's Opening Brief "misdescribed the Commission's proceeding * * * as a limited investigation" is answered by the last paragraph of the Commission's decision. After commenting on the insufficiency of the record before it, the Commission there states: "Were we to attempt to determine the reasonableness of allowances for a class of tank cars such as these, we cannot tell how far-reaching the investigation would have to be." That was a matter committed to the Commission by Section 15 (13) of the Interstate Commerce Act, and it was one of the questions made subject to investigation by the order of the Commission itself. The above quoted passage from the decision clearly shows that for reasons of its own, which were criticized by the dissenting opinion of three of the Commissioners, the Commission failed to investigate or determine what was a reasonable allowance to be made for the use of tank cars, generally. The investigation was therefore obviously a "limited investigation", as stated in Appellant's Opening Brief.

The foregoing, we believe, disposes of the repetitious statement in the Brief for Appellees that the Interstate Commerce Commission had decided the

identical questions raised by the special defense in these cases and also points the error of Appellant's claim that the decision of the Supreme Court approving the report of the Commission determined the issue in the instant cases in favor of Appellees. If we should grant, which we do not, that the opinion of the Supreme Court approved the decision and order of the Commission in its entirety, it certainly could not enlarge that decision or broaden its effect.

We now turn to that portion of Appellees' Brief captioned "Argument". In earlier pages we indicated that the first question presented on these appeals is as to whether the case before the District Court, presented an untried issue. The record is very clear and it is conceded by Counsel on both sides that the special defense pleaded by the Tank Car Corporation was that the payment to the Oil Works of the mileage collected by the former for the furnishing of the tank cars to the carriers is expressly prohibited and enjoined by law and particularly by the provisions of the Elkins Act.

It was stipulated by Counsel at the pre-trial conference and so stated in Paragraph III of the pre-trial Order of the District Court (R. 38) that the abovementioned *is the sole issue in these cases.* That Stipulation of Counsel in the present tense was accepted by the Court, it justified Appellant's contention that the issue was, at the date of the Stipulation, an untried issue. It does not lie with opposing Counsel to treat an express admission made in open Court, as a "bird of falcon" to be recalled at pleasure, and Counsel for

Appellees may not now claim contrary to their Stipulation.

It is significant that at no point in their brief do they claim that the issue was tried by the District Court, or by any Court. As stated by them their "contention has been, and is, that the issue had been tried and decided by the only tribunal competent to do so—the Interstate Commerce Commission". We have previously asserted—we think correctly—that the "Interstate Commerce Commission" was not either under the Judiciary Act, or any other statute, authorized to try an issue pending before a District Court, especially where the Supreme Court had held that the District Court had complete jurisdiction of the subject matter and of the parties. We also insist that the Supreme Court could not—and we submit did not—attempt to assume the authority of the Congress and vest in the Commerce Commission the jurisdiction to usurp the functions of the District Court.

Not entirely satisfied with their contentions that the "Interstate Commerce Commission" had tried and decided the issue, Counsel next assert, or at least infer, that the District Court on the trial of the first case No. 11,539 completely tried the issue. They admit, however, that the decision was reversed by this Court. (104 Fed. (2d) 903.) This set at large the decision of the District Court and, therefore, left the issue untried.

The questions viewed by the Supreme Court as administrative questions involved:

1. The fact that a shipper lessee receiving a mileage allowance in excess of the car rentals might in the final result obtain transportation at a lower cost than others who did not rent cars;

2. That the provision of existing tariffs denying payment of the mileage allowance to a shipper lessee directly constituted a departure from the express provisions of Section 15 (13) of the Act; and

3. That a shipper, who had incurred expenses over and above the car rentals in connection with the furnishing of the cars, was entitled to reimbursement of those expenses as a part of the compensatory allowance. Under the Court's decision these questions constituted the matters calling for the administrative judgment of the Commission after full investigation. They are all embraced within the authority vested in the Commission by Section 15 (13) of the Act, but they could, and should, be disposed of in a proceeding under that section to determine what is a just and reasonable compensation to be paid by carriers to a shipper furnishing a facility or other service to the carrier for transportation purposes. In fixing the uniform compensation, the Commission could and should take into consideration that some shippers might enjoy a profit from an allowance that would not profit another; also that some shippers, like appellant, would be put to some expense in preparing the cars for transportation uses and that the car-owners, not being the shipper or furnishing the cars should not be permitted to profit any from tariffs or mileage compensation. A cancellation of the restriction and

a general provision for the payment to all shipper lessees as a class for facilities by them furnished should be made by the Commission with universal effect and included in the published tariffs. But these questions did not, directly or indirectly, involve the issue, admitted to be the sole issue, in the present cases, that the payment by the Tank Car Corporation in accordance with its agreement of the mileage by it received from the carrier for the services rendered by the shipper lessee was expressly prohibited and enjoined under the language of the Elkins Act. Examination of the Elkins Act will disclose that the payments sought by appellant in the present actions was not directly prohibited or enjoined by the Act. Any action by the Commission in respect of the administrative questions, above referred to, could not therefore determine whether the payments sought were prohibited and enjoined by the provisions of the Elkins Act. The Supreme Court only contemplated that the Commission would, after investigation, determine what was a reasonable allowance to be made to a shipper furnishing the facilities and require the carriers to specify the amount of that allowance in their published tariffs and provide for the payment thereof to shipper lessees, thus removing the illegal restrictions in current tariffs against payment to shipper lessees. Of necessity these determinations would be effective in the future and it would devolve upon the Courts then to determine whether any acts upon which a complaint was based constituted a breach or departure from the orders of the Commission.

The above analysis clearly shows that the Supreme Court did not intend to take from the District Court or commit to the Interstate Commerce Commission the trial of the sole issue in these cases. It expressly held that the District Court had complete jurisdiction of the subject matter of the suit and of the parties. The Court's reference to the decision in *Mitchell Coal & Coke Co. v. Pennsylvania Rd. Co.* does not indicate such an intention on the part of the Court. The question of jurisdiction was raised in that case as it was raised by the Commission in this case and the Supreme Court merely held that the dismissal should be stayed so as to give the plaintiff therein an opportunity to apply to the Interstate Commerce Commission for an investigation, with the right to thereafter proceed with the trial of the case in the District Court and that *in which proceeding* the defendant there could then offer its defenses. That case did not purport to enlarge the jurisdiction or authority of the Interstate Commerce Commission and cannot be read as warranting the claim of appellees here that the Court intended either to clothe the Interstate Commerce Commission with the District Court's jurisdiction to decide the issue before it or to instruct the District Court to enter summary judgment without a trial of that issue. Yet that is exactly what counsel for appellees are now attempting to establish in these cases.

The Supreme Court, in *General American Tank Car Corporation v. El Dorado Terminal Company,* 308 U. S. 422, referred to in Appellees' Brief as "The First

Supreme Court Decision", held that the District Court had complete jurisdiction of the subject matter of the suit and of the parties; that the Oil Works had furnished the tank cars to the carriers and was entitled, under the plain provisions of Section 15 (13) of the Commerce Act to claim and receive the mileage allowance of one and one-half cents per mile previously approved by the Commission and set out in the published tariffs, but that since the published tariffs of the carriers provided that such payments should be made to the registered car owner and not to the shipper lessee, the Oil Works was not entitled, without change in those tariffs, to claim directly upon the railroad for the mileage.

Continuing, the Court said that the carriers were not entitled to impose such restriction in the face of the statutory provision that the shipper should receive the mileage allowance. The Court referred to a claim that the mileage allowance then being paid might in the final results enable the shipper to make a profit on the car lease agreement and obtain transportation at less than other shippers would be required to pay; and that these and other questions of an administrative character were within the competence of the Interstate Commission. In closing the Court remanded the case to the District Court to "be held pending the conclusion of an appropriate administrative proceeding". The Court's final action was premised by a statement that the record revealed an administrative problem or question within the province of the Commission. The administrative problem or question was

not, however, the admitted legal issue in the case but arose from the facts disclosed by the record that the existing railroad tariff denied to a shipper lessee the right to which such shipper was entitled under Section 15 (13) of the Commerce Act, to receive directly from the carriers the car mileage allowance for the furnishing of the tank cars and that contrary to the provisions of the Act the carriers had been paying the mileage to the car owner; also, that it might be found upon full investigation that the current rate of mileage allowance might in some instances permit the shipper to realize a profit or enjoy some advantages prohibited by the Elkins Act. The Court very clearly did not intend to divest the District Court of its jurisdiction to try the issue in the civil action pending before it, or to refer to the Commission anything more than the determination of the amount of a reasonable allowance to be paid by the carriers for the furnishing of tank cars or other facilities and for effecting such change as was necessary in regard to the payment of such mileage to accomplish conformance with the provisions of Section 15 (13) of the Commerce Act. It is obvious that if the Supreme Court intended to decide the special issue involved in the case before it (No. 11,539), it would have done so, and if it intended that the Interstate Commerce Commission should decide that issue, it would have so stated. But in pointing the difference between the jurisdictions of the Commission and the District Court, the Supreme Court very definitely held, in the language quoted at page 13 of Appellees' Brief, that

the Commission should establish the amount of the allowances and provide for an orderly payment that should not offend against the prohibitions of the Elkins Act and that there would be "remitted to the Court the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders". At the date of the Supreme Court's decision the second case (No. 11,538, before this Court) had not been heard. It involved Appellant's claims which accrued under the car-leasing contract over a period subsequent to those involved in the earlier action, No. 11,539, which was before the Supreme Court. Naturally, therefore, the record could not have disclosed anything affecting that second suit, and no issue or question presented or presentable in that case could have been referred to the Commission, as claimed by Appellees.

The use by the Supreme Court in its opinion of the term, "an appropriate administrative proceeding", indicates that the Supreme Court did not have in mind any decision by the Commission of the issue involved in the assumpsit action before the District Court but did have in mind an appropriate investigation proceeding provided for in Section 15 (13) of the Commerce Act. In such an investigation the Commission could approve the existing mileage allowance which had been in effect for years or modify it in line with the developed facts or suspend it, if it offended against the Elkins Act, by a suspension order, as was done in the *Refrigerator Car* case. This action would leave it to the Courts to determine, after such action was taken

by the Commission, whether any act of the carrier or shippers had violated such provisions. Previous payments and practices, which the Supreme Court in its later decision held to have been the subject of reference to the Commission, could not have involved a violation of such orders or regulations as the Commission might thereafter make under the Supreme Court's authority. Moreover, neither the Supreme Court nor the Commission could, without evidence, determine final economic results to the shipper lessee.

In referring to the Interstate Commerce Commission proceeding Counsel for Appellees assert that Appellant's application to the Commission sought a determination of the special issue in these cases. That claim is incorrect and wholly unwarranted. The only course open after the first decision of the Supreme Court was an application to the Commission for an investigation under the provisions of Section 15 (13) of the Interstate Commerce Act. Appellant's application was made under the authority of that Act and in consonance with the suggestion of the Supreme Court. Of necessity it referred to and in part quoted the decision of the Supreme Court. It could not alter the decision of the Court or serve to vest the Commission with any greater authority than it had under the statute. Under the provisions of Section 15 (13) of the Act the Commission was vested with authority either on application or its own initiative to determine after a full investigation what is a reasonable compensation to be allowed as a maximum to shippers who furnish facilities to the rail carriers and to cause

that rate to be published and made applicable to all shippers. The only purpose and effect of the application was to get the Commission to exercise its authority. This it could have done but did not do on its own initiative. After referring to the questions raised by the Supreme Court in its opinion, which we have previously noted, the application closed with a prayer that the Commission "make such order or orders as the Commission may consider proper in the premises". This prayer, as well as the application, must be read as limited by the provisions of Section 15 (13), supra—which was the only applicable statute. That statute gave to the Commission no authority to appropriate to itself the jurisdiction of the District Court or to decide any issue before that Court. Contrary to the apparent claim of Counsel for Appellees, the Commission could not by its order for investigation extend its authority beyond the provisions of the Act, or pass upon the validity of the car lease agreement which the Supreme Court had already held to be lawful in itself. Obviously the Commission could not exercise its investigating authority over an issue in the second case (No. 11,538), which had never been before the Supreme Court, or as to the final result on appellant's operations of payments which had not as yet been made. Extended discussion of the decision of the Commission would be purely academic.

Appellees' detached quotations from the Commission's report and their broad claims therefor must be read in the light of the fact disclosed by the report that the only payments passed upon by the Commis-

sion were those previously made by Appellees under the lease contract, which were not a subject of the present actions. The closing paragraph of the report quoted by Appellees that the Oil Works (Appellant) is entitled to no allowance from the respondent rail carrier or carriers for the special cleaning and preparation of the tank cars is wholly irrelevant. That question was not involved; no such claim had been made; and in fact the Oil Works had expressly disclaimed any right to so claim. Moreover, such a determination had no bearing on the rights of the Oil Works to claim against the Tank Car Corporation under the car lease agreement.

Appellees cavalierly assert that the Commission's order was a complete disposition of the issue before the District Court and also of the Oil Works' claim for money accruing subsequent to the filing of the first action (No. 11,539) under the car lease agreement. This is a mere assumption on the part of Appellees' Counsel. Obviously, indebtedness accruing in favor of the Oil Works long after the first action was begun was not involved in that action and any question as to the legality of such claim was not before the Supreme Court. Moreover, the Interstate Commerce Commission in its report in the *Refrigerator Car* case proceeding and the opinion of the Supreme Court quoted in part at page 12 of Appellees' Brief had held that a shipper lessee would be entitled to collect from the carrier not only the car rentals but also actual expenses in connection with the furnishing of the cars.

Appellees' reference to the Three-Judge Court proceeding merits no comment.

The second Supreme Court decision in *El Dorado Oil Works, et al. v. United States, et al.,* 328 U. S. 12, 90 L. Ed. 1053, is concerned very largely with a discussion of the decision and order of the Interstate Commerce Commission rendered practically four years after the filing of the above mentioned application. Appellant in that case had contended that the Commission was not authorized under the statute to pass upon the validity of payments made by Appellees under the car lease contract years before and for mileage earned in the years 1934 and 1935 and not involved in the present actions. In deciding against Appellant's contention, the Supreme Court held that the Commission had made its determination as to the lawfulness of those practices and payments on the basis of Appellant's own application. With due respect to the Supreme Court, Appellant's application could not have vested the Commission with an authority it did not already possess under the statute.

Continuing, the Supreme Court held that the question before it in the former case (308 U. S. 422) did not relate to the future but to past allowances and hence, that the question remitted by it to the Commission related only to the past transactions between the parties under the car lease contract. The question as to the validity of payments not yet made but claimed by Appellant under the terms of the car lease contract was not before the Court or the Commission, and therefore Appellant's right to try the issue involving

the legality of such payments, if and whenever made, under the restrictions of the Interstate Commerce Act, was not decided. That, however, is the question raised by the issue in the instant cases. This question could not be properly determined except upon a trial of the issue, inasmuch as the test as to whether an act complained of constituted a rebate or concession prohibited by the Elkins Act, must depend upon the final results as disclosed by the facts. The question would be whether in the final result a payment such as that involved in the present actions would enable a shipper to transport its commodities at rates less than the published tariffs, or to obtain and enjoy an advantage over other shippers. This is the rule announced by Mr. Justice Roberts in his opinion in the case of *General American Tank Car Corporation v. El Dorado Terminal Company,* supra, and also recognized by the decision of the same Court in the later decision of *El Dorado Oil Works v. United States,* 328 U. S. 12, 90 L. Ed. 1053. Appellant, in demanding a trial of these cases before the District Court, desired to, and was entitled to, develop all of the facts so as to show that in the final result Appellant could neither have made a profit on the car lease agreement nor received any preference whatsoever within the provisions of the Elkins Act.

In denying Appellant's request for such trial and dismissing the actions, the District Court committed an error. At page 9 of Appellant's Opening Brief, we cited to the Court's attention various decisions of the United States Supreme Court and of other Federal

Courts, which sustained our position. In substance, the holding of those cases was that where there is either an issue of fact or an issue of law concerning the sufficiency of undisputed facts, it is error for the District Court to grant summary judgment.

The question as to the final result to the Appellant of payment in the future by Appellees of monies received by them as Appellant's agent under the terms of the car lease agreement, is purely a question of fact and the determination of that question as to the effect of payments not yet made would not be determined by the decision of the Interstate Commerce Commission or even of the Court as to the result of payments previously made. In *U. S. v. Hartford Empire Co.*, 1 Fed. Rules Decisions 424 at 427, the Court denied the right of the District Court to summarily dispose of an undetermined issue in the following language:

> "The court cannot prejudge. He does not know what the testimony will disclose. He cannot anticipate facts of his own will and motion."

It is significant that opposing counsel passed these cases without discussing or mentioning them. This omission is not sufficiently answered by Appellees' attempt at repudiation of their stipulation in the District Court, that there *is* an issue in these cases. The record shows the existence of such issue and the Brief for Appellees does not disclose that the issue was ever tried by a Court. Nor do opposing counsel advance such a claim, except inferentially, that the Interstate Commerce Commission decision declared as to conditions applying to other payments of different

dates, general principles which would be applicable only if the proven facts make them so.

The final result to the shipper lessee of the payments claimed but not yet made was not tried or decided by any Court or by the Commission and was still open and undecided at the date of the pre-trial conference.

Appellees have cited *Thompson, Trustee, et al. v. Texas Mountain Railroad Co.*, 328 U. S. 134, to the point that when the Interstate Commerce Commission has acted, the Court may proceed to enter judgment in conformity with the terms and conditions specified by the Commission. We might concede that in a proper case this principle could be invoked, but it would have no force otherwise. The facts of the case make the principle inapplicable here. The case involved the right of a contracting railroad carrier to terminate a joint trackage agreement and the authority of the Court to act upon such termination, without prior action by the Interstate Commerce Commission. The jurisdiction to control such termination of a trackage agreement rested with the Commission and its decision thereon was controlling and should, therefore, be recognized and followed by the Courts. The decided case does not expressly or by implication require the entry of judgment in the District Court without a trial on an issue before it, and on no theory can have any application to the appeals before this Court. The fact that the decision in *General American Transportation Co. v. El Dorado* directed that the trial Court should stay its hand pending the conclu-

sion of an administrative proceeding before the Commission does not support the point for which counsel for Appellees cited it. It has no application whatever.

At page 13 of Appellant's Opening Brief we made the claim and cited supporting authorities that the judgments of the District Court involved on this appeal were unsupported by findings of fact and conclusions of law and should be reversed. Counsel for Appellees concede the general rule but deny its application. Their contention is that in *Perry v. Baumann,* 122 F. (2d) 409, and *Timetrust v. Securities and Exchange Comm.,* 130 F. (2d) 214, both of which were decided by this Court, the judgments were reversed because of the absence of findings upon issues which had been tried, and they seek to distinguish the decision of the Supreme Court in the case of *Mayo v. Lakeland Highlands, etc.,* 309 U. S. 310, 84 L. Ed. 774, which is also cited by Appellant, on the plea that the case was remanded to the trial Court to make findings on the disposition of a motion for preliminary injunction. In citing the last-mentioned case we stated that the action of the trial Court was upon an application for injunction and we cited the Court's decision that upon such motion the appealing party was entitled to have "explicit findings of fact upon which the conclusion of the Court was based. Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal." There would seem to be no inherent difference between a motion for judgment and an application for injunction and, therefore, no basis for a departure from the

practice pointed out by the Supreme Court in its decision in *Mayo v. Lakeland Highlands, etc.* Counsel for Appellees cite *Lindsay v. Leavy,* 149 F. (2d) 899. If this decision is to be read as contrary to the rule announced in *Mayo v. Lakeland Highlands, etc.,* supra, it is non-effective as against the Supreme Court's decision; but if the case can be distinguished from that before the Supreme Court in the *Mayo* case, so as to permit departure from the rule of that case, it must be upon the ground that the case involved a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Such motion is based upon the ground that there is no triable issue before the Court. The citation of the case by counsel for Appellees was, no doubt, prompted by their adherence to the theory advanced elsewhere in their brief that the Interstate Commerce Commission had tried and disposed of the issue in the civil action and, therefore, there was no triable issue. No motion for summary judgment under Rule 56 of the Rules was made. As before stated, it was stipulated by counsel and agreed by the Court that there was at that date an issue in the case. We have shown that it had not been tried by the Court, and the failure to so try it and to make findings is assigned as error on this appeal. From the report of the case of *Lindsay v. Leavy,* supra, it would appear that the lower Court really viewed the complaint as not stating a cause of action that could be maintained or proved at all. In other words, the case was disposed of for want of equity.

In conclusion Appellant submits:

1. That Appellees' answer to the complaint in the instant cases contained the special defense that Defendant (Appellee here) was and is expressly prohibited and enjoined by law and particularly by the provisions of the Elkins Act from paying to Plaintiff (Appellant here) the monies sought to be recovered by Plaintiff. Insofar as that defense was founded upon the express provisions of the Elkins Act, it is answered by the Act itself. Any question as to whether payment by Appellees to Appellant as provided in the car lease agreement would amount to a rebate or enable the shipper (Appellant) to transport its commodities at less than the tariff rates or enjoy a preference over other shippers presents a question of fact which, as we have pointed out in the earlier pages of this brief and as stated by the Supreme Court in the two decisions discussed, would depend upon the final result disclosed by all of the facts upon a trial of the issue. Appellant was entitled to a trial of that issue before the District Court. Such trial was denied. The District Court based its denial of trial and its order for judgment on the decisions of the Supreme Court referred to at page 45 of the record with the conclusion that there were no facts to be determined in this litigation. (R. 44.) We have shown in Appellant's Opening Brief and again at some length in this brief that neither of the decisions of the Supreme Court passed upon or determined the special issue referred to it. We have likewise shown that the decision and order of the Interstate Commerce Commission could not on

constitutional grounds, and did not actually, determine that issue. The issue was therefore untried at the date of the pre-trial conference. Appellant was entitled to such trial, and the District Court erred in denying it and ordering judgment for Appellees. This position is fully supported by the decisions cited at page 9 of Appellant's Opening Brief, as to which Appellees' counsel have offered no criticism. We submit, therefore, that the judgments should be reversed.

Dated, San Francisco, California,
August 6, 1947.

Respectfully submitted,
W. F. WILLIAMSON,
WILLIAMSON & WALLACE,
Attorneys for Appellant.

WILLIAM B. MEAD,
Of Counsel.